84-1556

No.

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IN THE
SUPREME COURT OF THE UNITED STATES

Spring Term 1985

DURHAM HOSIERY MILLS, INC. and
GEORGE A. CRALLE, Individually,
JOHN P. BARNETT, Individually,
H. E. SCHOENHUT, JR., W. K.
BIGELOW, H. E. RODENHIZER,
W. C. SPANN,
Petitioners

vs.

ROBERT C. WHITE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

I. WHETHER THE FOURTH CIRCUIT AND THE DISTRICT COURT ERRED IN UPHOLDING A JURY VERDICT BASED ON THE RESPONDENT'S ALLEGED LOSS OF HIS SHAREHOLDER APPRAISAL RIGHTS WHERE THE STATE COURT OF VIRGINIA RULED THAT THE RESPONDENT HAD NOT SO LOST HIS APPRAISAL RIGHTS AND THE RESPONDENT THUS SUFFERED NO DAMAGES?

II. WHETHER THE FOURTH CIRCUIT AND THE DISTRICT COURT ERRED IN UPHOLDING THE JURY VERDICT BASED ON THE RESPONDENT'S ALLEGED LOSS OF HIS SHAREHOLDER APPRAISAL RIGHTS WHERE THE VIRGINIA SUPREME COURT HAS RULED THAT THE STATE'S APPRAISAL REMEDY MAY NOT BE ADMINISTERED IN FEDERAL COURTS AND THE JUDGMENT BELOW UNDERMINES STATE CORPORATE POLICY CONTRARY TO SANTE FE INDUSTRIES V. GREEN, 430 U.S. 462, 97 S.CT. 1292, 51 L.Ed.2d 480 (1977).

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

QUESTIONS PRESENTED..... 1

CORPORATE DISCLOSURE..... 3

FOURTH CIRCUIT OPINION..... 3

STATEMENT OF JURISDICTION..... 3

STATUTES INVOLVED..... 4

STATEMENT OF THE CASE..... 5

REASONS FOR GRANTING WRIT..... 19

CONCLUSION..... 28

SIGNATURES..... 29

CERTIFICATE OF SERVICE..... 30

APPENDIX.....A-1

TABLE OF AUTHORITIES

Cases

Adams v. United States Distributing Corp., 184 Va. 134, 34 S.E.2d 244 (1945) cert. denied, 327 U.S. 788 (1946).....28
Glick v. Campagna, 613 F2d 31 (3rd Cir. 1979).....23
Jefferson Standard Life Insurance Co. v. Guilford County, 226 N.C. 441, 38 S.E.2d 519 (1967).....24
Occidental Life Insurance Co. of North Carolina v. Pat Ryan & Associates, Inc., 496 F2d 1255, (4th Cir. 1974) cert. denied, 419 U.S. 1023 (1975).....24
Role v. Blyth, Eastman Dillon & Co., Inc., 637 F2d 77 (2nd Cir. 1980).....23
Sante Fe Industries v. Green, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977).....1,25,26

Statutes

FED.R.CIV.P.60(b).....7
N.C. GEN. STAT. §55-113(b) (1925).....4,27
SUP.CT.R. 17.1.....4
28 U.S.C. 17 C.F.R. 240.10b-5.....4,5,24,25,27
28 U.S.C. §1331 (1976).....6
VA. CODE §13.1-75 (1978).....4,27

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IN THE
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DURHAM HOSIERY MILLS, INC. and GEORGE A. CRALLE, Individually, JOHN P. BARNETT, Individually, H. E. SCHOENHUT, JR., W. K. BIGELOW, H. E. RODENHIZER, W. C. SPANN,
Petitioners

vs.

ROBERT C. WHITE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS TO REVIEW ITS DECISION

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner-Defendants, named above, ("Petitioners"), respectfully request that a Writ of Certiorari issue to review the decision of the

Fourth Circuit Court of Appeals below, and in support thereof respectfully show that:[1]

1. A copy of the decision of the Fourth Circuit is attached as Exhibit A. Robert C. White v. Durham Hosiery Mills, Inc., No. 83-2023 (4th Cir. Jan 1, 1985).

2. Statement of Jurisdiction.

On January 7, 1985, the Fourth Circuit Court of Appeals entered judgment affirming a jury verdict in favor of Respondent-Plaintiff ("Respondent") in the United States District Court for the Eastern District of North

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[1] Corporate Disclosure: A listing of all parent companies, subsidiaries and affiliates of defendant Durham Hosiery Mills, Inc. was filed at the Fourth Circuit Court of Appeals on November 3, 1983.

Carolina. By Order entered February 1, 1985, the Fourth Circuit denied the Respondent's Petition for Rehearing. This petition is filed pursuant to SUP.CT.R. 17.1, on the grounds that (i) the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the District Court for the Eastern District of North Carolina and (ii) has decided a federal question in a way in conflict with a state court of last resort.

3. Statutes Involved.

The following statutes are set forth verbatim in the Appendix hereto: 17 C.F.R. §240.10b-5 (1976); N.C. GEN. STAT. §55-113(b) (1925); VA. CODE § 13.1-75(c) (1978).

4. Statement of the Case.

Procedural History

This Petition involves an action filed on October 14, 1981, by Respondent White in the United States District Court for the Eastern District of North Carolina, arising from the merger of Durham Hosiery Mills, Inc., a North Carolina corporation, into DHM, Inc., a Virginia corporation. The Complaint alleges that Petitioners, Officers and Directors of Durham Hosiery Mills, Inc. and the majority shareholder of DHM, Inc., issued misleading proxy materials that caused White to lose his appraisal rights in state court, for which he sought damages under Rule 10b-5 of the Securities Exchange Act of 1934, 17 C.F.R. 240.10b-5 (1976)

("Rule 10b-5") and common law fraud. Respondent White invoked federal jurisdiction under 28 U.S.C. §1331 (1976).

This case went to the jury on three issues, each related to White's alleged loss of his dissenter's rights. The jury rendered its verdict for the Respondent on September 15, 1983. After Petitioners gave notice of appeal from the judgment, the parties and the Court discovered that contrary to his assertions at trial, White's state appraisal action had not been dismissed in the state court of Virginia. Petitioners had objected at trial to White's testimony that his case was "dismissed;" the trial court overruled the objections. Upon learning the truth, petitioners filed

in the District Court on March 5, 1984, a "Motion and Affidavit to Vacate Judgment" pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

On August 3, 1984, the Honorable James C. Fox, Judge of the United States District Court for the Eastern District of North Carolina, denied the petitioners' Motion on the ground that the Court lost jurisdiction of the case following petitioners' appeal. The Court predicated its denial of the Order on the "continuing limbo" of the Virginia proceeding.

On August 9, 1984, attorneys for the parties appeared at a hearing in the Circuit Court of Danville, Virginia, to clarify the status of Respondent's state appraisal action.

On October 1, 1984, the Honorable James F. Ingram entered an Order stating that no dismissal or discontinuance had been entered in the appraisal action and that the proceeding "has been pending continuously since its commencement." (Exhibit B)

On October 24, 1984, Petitioners filed a "Motion and Affidavit to Supplement the Record on Appeal" with the Fourth Circuit to include Judge Ingram's Order. The Fourth Circuit has never ruled upon that Motion. On January 7, 1985, the Fourth Circuit affirmed the judgment of the jury for the petitioner.

On or about January 19, 1985, the Petitioners filed a Petition for Rehearing in the Fourth Circuit, based primarily on the District Court's and

Fourth Circuit's failure to consider Judge Ingram's Order. By Order entered February 1, 1985, the Fourth Circuit denied the Respondent's Petition for Rehearing. (Exhibit C)

On March 5, 1985, Respondent White filed in the Circuit Court of Danville a "Motion for Voluntary Dismissal" of his appraisal action. On March 5, 1985, Judge Ingram entered a Consent Order allowing the Voluntary Dismissal with prejudice.

Petitioners now seek a Writ of Certiorari from the Supreme Court based on the legal errors of the District Court and Fourth Circuit in granting the Respondent a verdict based on the false premise and untrue testimony that the Respondent had lost his state appraisal rights.

Facts

In 1955, Durham Hosiery Mills, Inc. ("Durham Hosiery") had two mills located in Durham, North Carolina producing cotton yarn and women's hosiery. In its early years, Durham Hosiery effectively competed for the women's hosiery market, experiencing a boom in 1971 and 1972 with the introduction of women's pantyhose. In 1974, Durham Hosiery purchased another mill located in Danville, Virginia. Shortly thereafter, the pantyhose market became glutted, and as profits fell, management began efforts to sell its operations.

In August, 1980, a New York stock broker contacted the President of Durham Hosiery, George A. Cralle, to inquire about the recent sale of one

mill. During the conversation, the broker stated that he was interested in brokering the sale of a large block of Durham Hosiery stock owned by two brokerage firms. One of the firms, J. L. Schiffman Company, the "market maker" of the stock, was asking $7.00 per share for the Class B stock and $12.00 per share for the Class A stock. Cralle contacted John P. Barnett, who was involved in the sale of the Danville mill to Durham Hosiery, and posed the opportunity for acquiring a premium block of stock.

Barnett was interesting in acquiring the Durham Hosiery stock for investment purposes and with a view toward reorganizing the company. Through Cralle, on November 7, 1980, Barnett purchased 2,483 shares of

Class A and 25,705 shares of Class B, or forty percent (40%) of the outstanding stock. Barnett subsequently purchased from Harry S. Schoenhut, an officer and director of Durham Hosiery, all of his shares of Class A and B stock. Barnett agreed that after the reorganization of the company, Schoenhut would receive retirement benefits in the sum of $500,000.

After Cralle and Barnett discussed, generally, their intentions for the reorganization of Durham Hosiery, Barnett contacted an attorney, Frederick R. Russell, who structured the merger and prepared the proxy materials. Neither Cralle nor Barnett made any decision concerning the required disclosures in the proxy materials. Under Russell's plan,

those shareholders interested in remaining in the corporation could accumulate 4,500 shares in the old corporation to acquire one share in the new corporation, which would have only 16 shares of stock.

The proxy materials were mailed to the Durham Hosiery shareholders on December 22, 1980. The proxy statement explained, in part:

> (5) Rights of Dissenting Durham Shareholders - Any shareholder who objects to the merger and complies with the provisions of Section 13.1-75 of the Virginia Stock Corporation Act (or the similar provisions of North Carolina law) may demand cash payment for the fair value of their stock, determined as of the date prior to approval of the merger. To receive such payment a shareholder must (i) mail a written objection to the company at least five days before the merger; (ii) vote

against the merger; (iii) submit share certificates for notation after the merger.

On December 22, 1980, the Board of Directors of Durham Hosiery voted unanimously in favor of the plan for reorganization and merger. At the special meeting on January 12, 1981, the overwhelming majority of Class A shares (91.44%) and Class B shares (80.02%) voted for the merger. On January 15, 1981, the Articles of Merger of Durham Hosiery Mills, Inc. and DHM, Inc. were filed and the merger was effected.

Respondent White voted by proxy against the merger. He enclosed his proxy in a letter dated January 6, 1981, prepared by his attorney. The letter begins:

> Pursuant to North Carolina General Statutes §55-113(b) and §13.1-75 of the Virginia Stock Corporation Act as applicable, I hereby give written notice to Durham Hosiery Mills, Inc. and to DHM, Inc. that I object to the proposal and plan of reorganization submitted to the shareholders of Durham Hosiery Mills, Inc. on or about December 22, 1980.

White also requested that he be given notice of the outcome of the merger so that he could make a formal written demand for payment "pursuant to the respective statutes of North Carolina and Virginia." White testified at trial that he had no quarrel with the merger and voted against it only to preserve his dissenter's rights.

White subsequently received a letter from Durham Hosiery, dated January 15, 1981, stating that pursuant to the approval of the majority

of the shareholders, the merger had occurred. The letter also instructed White to either submit his stock for redemption at $7.00 per share or pursue his dissenter's rights.

White waited almost three weeks before returning his shares of stock to the corporation. In a registered letter dated February 3, 1981, White stated that he was enclosing only 700 of his 800 shares of stock because he was waiting for Merrill Lynch to release his remaining 100 shares. On February 9th, Cralle sent White a return letter prepared by Attorney Russell, enclosing White's stock certificates, stating that the company records had closed on February 2nd, and that an escrow account had been established for the few shareholders

who failed to act timely under the reorganization plan.

On February 18th, White's attorney prepared and mailed to Cralle another registered letter signed by White, noting that "Mr. White continues to dissent. . . and wishes to exercise his rights of dissent in accordance with Virginia law."

Attorney Russell responded to White's letter with a registered letter, dated March 2nd, stating that in his opinion White's potential rights as a dissenting shareholder terminated as of February 2nd.

On March 18, 1981, White's Virginia attorney filed a bill of complaint in the Circuit Court of the City of Danville seeking a declaration of the fair value of his stock.

Attorney Russell responded to the complaint by filing a "Special Plea and Motion to Dismiss," on April 7, 1981. In the motion, Russell asserted that White's rights as a dissenting shareholder in Durham Hosiery had lapsed pursuant to N.C. Gen.Stat. §55-113(b) or VA. CODE §13.1-75. White was allowed to testify at trial, over objection, that his attorney informed him that the Danville action was subsequently "dismissed." He did not offer a copy of the order of dismissal into evidence.

Shortly after the trial, the parties learned that the Respondent's appraisal action in Danville, Virginia had not in fact been dismissed. Petitioners accordingly filed a Motion to Vacate the Judgment of the Jury. After

subsequent attempts by the Petitioners to learn the truth regarding the status of the appraisal case, a hearing was held in the Circuit Court of Danville. On October 1, 1984, the Honorable James F. Ingram entered an Order stating that no dismissal or discontinuance had been entered in the appraisal action and that the proceeding "has been pending continuously since its commencement." As previously indicated, that Order is attached as Exhibit B hereto.

6. Reasons for Granting the Writ.

I. THE FOURTH CIRCUIT AND THE DISTRICT COURT ERRED IN UPHOLDING A JURY VERDICT BASED ON THE RESPONDENT'S ALLEGED LOSS OF HIS SHAREHOLDER APPRAISAL RIGHTS WHERE THE STATE COURT OF VIRGINIA RULED THAT THE RESPONDENT HAD NOT SO LOST HIS APPRAISAL RIGHTS AND THE RESPONDENT THUS SUFFERED NO DAMAGES.

The evidence admitted at trial led the court and the jury to believe that the Respondent had a cause of action that did not legally exist. White could not properly claim damages for loss of the fair value of his stock under either Rule 10b-5 or common law fraud because his state appraisal action was pending at the time of the federal trial. He had not lost his appraisal rights, or been damaged, as a result of the Respondents' conduct.

The Fourth Circuit, in affirming the judgment, was not apprised of all of the facts concerning the pendency of the petitioner's state court action. First, the Court did not consider the fact that White's Virginia counsel had <u>deliberately</u> withheld sub-

mission of an Order dismissing White's appraisal action after an oral ruling from the bench, for the purpose of "keeping the proceeding alive" in state court. Second, the Court did not consider the effect of Judge Ingram's Order of October 1, 1984. In that Order, Judge Ingram squarely ruled that the Respondent's appraisal action had never been dismissed and was then viable. The Order states in pertinent part:

> 4. No dismissal or discontinuance has been entered herein and this proceeding has been pending continuously since its commencement. Under the circumstances, the Court cannot grant and therefore denies (i) the demurrer asserting earlier dismissal of this proceeding filed on behalf of the dissenting stockholders other than Mr. White as well as (ii) the request made by Mr. White's counsel for a statement why

> the proceeding earlier was dismissed.

The appraisal proceeding in the Circuit Court of Danville was clearly alive and pending at the time of this federal trial. The jury was misled on this paramount issue of fact.

In its Opinion, the Fourth Circuit treated the lack of an entry of dismissal as a mere technicality stating:

> Finally, the appellants urge that the district court erred in denying their Rule 60(b) motion. After the district court trial, the parties discovered that the Danville Circuit Court had failed to enter a final order dismissing White's action in that court, apparently due to counsel's oversight. The Danville court concluded in 1981 that it lacked subject matter jurisdiction and orally ordered the case dismissed, but a dismissal order was

never presented by counsel. (Slip Opinion p.10)

It is now clear that the non-entry of the dismissal order resulted not from mere oversight but from the intentional efforts of Respondent's own counsel. More importantly, the pendency of the Respondent's appraisal action precludes recovery under Rule 10b-5 and common law fraud because the petitioner has suffered no damages under either cause of action, a point totally overlooked by the Fourth Circuit panel.

A petitioner's recovery under Rule 10b-5 is limited to actual loss caused by a respondent's conduct. Role v. Blyth, Eastman Dillon & Co., Inc., 637 F2d 77 (2nd Cir. 1980); Glick v. Campagna, 613 F2d 31 (3rd Cir. 1979). The standard for damages

in a Rule 10b-5 case is the difference in the market value of the stock and the price paid. Occidental Life Insurance Co. of North Carolina v. Pat Ryan & Associates, Inc., 496 F2d 1255, (4th Cir. 1974) cert. denied 419 U.S. 1023 (1975). A petitioner can recover for fraud under North Carolina law only upon a showing of actual damages or legal detriment. Jefferson Standard Life Insurance Co. v. Guilford County, 226 N.C. 441, 38 S.E.2d 519 (1967). Thus, under both Rule 10b-5 and common law fraud, petitioner must show actual damages as an element of recovery.

Respondent White was pursuing an appraisal action for the fair value of his stock at the State Courts of Virginia at the time of this trial. Any mispresentation by Petitioners as

to his appraisal remedy caused him no harm. The element of damages under both Rule 10b-5 and common law fraud is therefore lacking and there is no justification for the jury verdict.

II. THE FOURTH CIRCUIT AND THE DISTRICT COURT ERRED IN UPHOLDING THE JURY VERDICT BASED ON THE RESPONDENT'S ALLEGED LOSS OF HIS SHAREHOLDER APPRAISAL RIGHTS WHERE THE VIRGINIA SUPREME COURT HAS RULED THAT THE STATE'S APPRAISAL REMEDY MAY NOT BE ADMINISTERED IN FEDERAL COURTS AND THE JUDGMENT BELOW UNDERMINES STATE CORPORATE POLICY CONTRARY TO SANTE FEE INDUSTRIES V. GREEN, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977).

Respondent's Rule 10b-5 action is, in effect, no more than a federal appraisal action. In awarding actual damages of $25,900.00, the jury gratuitously added in the margin of the verdict form, "$37.00 per share." This court should refuse to allow a shareholder to invoke Rule 10b-5 as a

substitute for a clearly defined and available state remedy. Such an extension of remedies would squarely conflict with the rule of Sante Fe Industries, Inc. v. Green, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed. 2d 480 (1977).

In Sante Fe, this Court held as an alternate ground that considerations of state policy militated against a federal breach of fiduciary duty claim. The court recognized that a breach of fiduciary claim is traditionally relegated to state law and that in such cases it is "entirely appropriate" to confine petitioners to their state law remedy. Id. at 478, 97 S.Ct. at 1304, 51 L.Ed.2d at 495. The court concluded:

Absent a clear indication of

> congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden. 430 U.S.at 478; 97 S.Ct.at 1304; 51 L.Ed.2d at 495.

The Court thereby refused to extend Rule 10b-5 to cover the "corporate universe" and ruled that the complaint had been properly dismissed.

Both North Carolina and Virginia have enacted statutes regulating the procedure for allowing dissenting shareholders to seek an appraisal of their stock upon a corporate reorganization or merger. The petitioner, fully advised by counsel, failed to timely comply with the provisions of either statute. VA. CODE §13.1-75 (1978); N.C. Gen.Stat. §55-113 (1925).

Under such circumstances, the availability of an appraisal or any other remedy should be decided under state corporate law by a state court. Indeed, the Virginia courts jealously guard their right to administer their state's appraisal remedy. In Adams v. United States Distributing Corp., 184 Va. 134, 34 S.E.2d 244 (1945), cert. denied, 327 U.S. 788 (1946), the Virginia Supreme Court rebuked one federal judge who failed to dismiss an action and proceeded to attempt to administer the Virginia appraisal remedy. This Court should not allow shareholder suits in federal court to override clearly defined state corporate policy.

Conclusion

WHEREFORE, Petitioners respect-

fully request that this Court issue a Writ of Certiorari to review and reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted, this the 29th day of March, 1985.

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CERTIFICATE OF SERVICE

We hereby certify that we are admitted to practice law before the Supreme Court of the United States; and that we have served a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States by depositing the same in a post office or an official depository to the attorneys for the Respondent in compliance with SUP.CT.R. 28.3 addressed as follows:

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This the 29th day of March, 1985.

BOYCE, MITCHELL, BURNS & SMITH, P.A.

By: G. Eugene Boyce
G. Eugene Boyce

DeBANK, McDANIEL, HEIDGERD, HOLBROOK & ANDERSON

By: L. Bruce McDaniel
L. Bruce McDaniel

ATTORNEYS FOR PETITIONERS

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-2023

Robert C. White,

Appellee,

versus

Durham Hosiery Mills, Inc.; George A. Cralle, Individually; John P. Barnett, Individually; H. E. Schoenhut, Jr.; W. K. Bigelow; H. E. Rodenhizer and W. C. Spann,

Appellants.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, District Judge. (A/A 81-912)

Argued: October 31, 1984
Decided: January 7, 1985

Before MURNAGHAN and SPROUSE, Circuit Judges, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

L. Bruce McDaniel; G. Eugene Boyce (Boyce, Mitchell, Burns & Smith, P.A.; DeBank, McDaniel, Heidgerd & Holbrook on brief) for Appellants; Kevin P. Roddy; William Woodward Webb (Smith, Taggert, Gibson & Albro; Broughton, Wilkins & Webb, P.A. on brief) for Appellee.

PER CURIAM:

Durham Hosiery Mills, Inc. ("Durham"), and George A. Cralle, John P. Barnett, H. E. Schoenhut, Jr. W. K. Bigelow, H. E. Rodenhizer, and W. C. Spann, officers, directors, and major shareholders of Durham, appeal the judgment of the district court, entered after a jury verdict, awarding Robert C. White compensatory damages of $25,900 and punitive damages of $50,000 on his action for misrepresentation under Rule 10b-5,[1] promulgated by the Securities and Exchange Commission under section 10(b) of the Securities Exchange Act of 1934,[2] and under North Carolina common law fraud.

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[1] 17 C.F.R. §240.10b-5 (1983).

[2] 15 U.S.C. §78j(b) (1982).

White based his suit on appellants' alleged misrepresentations in proxy solicitation materials preceding a corporate merger, claiming that appellants misled him as to the appropriate forum for a dissenter's appraisal action. Appellants contend that there was insufficient evidence to submit the case to the jury under either theory and that the court erred in allowing testimony from White's expert witness concerning the valuation of Durham stock, in admitting documentary evidence concerning Durham's financial condition after the appropriate statutory date for valuation, and in refusing to grant their motion to vacate the judgment under Fed.R.Civ.P. 60(b). We affirm.

This controversy is an aftermath

of the merger of Durham, a North Carolina corporation, and DHM, Inc., a Virginia corporation, on January 15, 1981. Durham had profitably operated three mills at different locations until the early 1970's when it suffered reverses because of the vagaries of the ladies' hosiery market. It eventually disposed of all the mills except one in Danville, Virginia. John P. Barnett, a licensed attorney, investor and former Danville stockbroker, became interested in acquiring ownership and control of the remaining Danville facility. Without disclosing Barnett's identity, Cralle, Durham's president, arranged for Barnett to purchase from two New York stockbrokers forty percent of the 71,101 outstanding shares of Durham. Shortly

thereafter, Barnett purchased from Schoenhut, an officer and director of Durham, the latter's shares of stock on the same terms. Barnett agreed that after the merger Schoenhut would receive deferred compensation of $500,000 for consulting services to the corporation. Cralle received similar assurances, in addition to an option to sell to Barnett his shares of Durham. By the time of the merger, Barnett had accumulated a majority of the Durham stock.

Barnett, Cralle, and their attorney, Frederick L. Russell, structured the merger and reorganization. Shareholders of Durham received one share of DHM, Inc. for every 4,500 shares of Durham. DHM, Inc. was to have only sixteen shares outstanding. Holders

of fewer than 4,500 Durham shares had either to purchase sufficient shares to bring their total to 4,500, or to sell their shares at a price determined by bids received by the corporation from holders seeking more shares.

Durham mailed to its shareholders, including white, a Proxy Statement and other documents containing descriptions of the proposed merger and reorganization, all of which were prepared by Russell. Cralle read the documents and signed the Proxy Statement. According to the Proxy Statement, shareholders objecting to the merger could dissent and seek appraisal of and payment for their shares from the corporation by complying with the "Virginia Stock Corporation Act (or the similar provision of North

Carolina law)." The Proxy Statement described in detail the procedures to be followed by the shareholders in complying with the Virginia statute,[3] but made no mention of the North Carolina dissenter's rights statute[4] beyond the quoted parenthetical reference.

White owned 800 shares of Durham stock. He received the proxy materials in late December 1980 and consulted his North Carolina attorney. White then notified Durham of his objection to the merger and his intention to dissent and seek appraisal "pursuant to the respective statutes of North Carolina and

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[3] Va. Code §13.1-75 (1978).

[4] N.C. Gen. Stat. §55-113 (1982).

Virginia." He enclosed his proxy, voting his shares against the merger. Cralle informed White by letter dated January 15, 1981, that over eighty percent of the shares of Durham had been voted in favor of the merger at the January 12 shareholders' meeting. White was offered $7.00 per share for his stock[5] or, alternatively, the rights of a dissenting shareholder under the Virginia Stock Corporation Act, a copy of which was enclosed. He was also advised that he was required to submit his shares for notation of dissent within the statutory time period. There was no reference to the law of North Carolina.

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[5] The only bid for additional shares came from Barnett, who bid $7.00 per share for all offered for sale.

White discussed his dissenters' rights under Virginia law with his attorney and, on February 3, 1981, requested that notation of dissent be recorded on his certificates.[6] Durham replied that, because the statutory time period for notation of dissent had expired on February 2, the request was not timely and therefore the shares were returned without notation. Durham advised White that he would be compensated for his shares from an escrow account created pursuant to the merger and reorganization. Another request for notation of White's shares proved unavailing.

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[6] White testified that he delayed requesting notation until he received on February 2 a confirmation of his Durham shareholdings from his brokerage firm.

White next filed a complaint in the Circuit Court of the City of Danville, Virginia, seeking an appraisal of the fair value of his stock under the Virginia dissenters' rights statute. Durham, by its attorney Russell, filed a motion to dismiss White's action, on the ground that North Carolina, not Virginia, law governed dissenter's rights after the merger.[7] The Danville Circuit Court,

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[7] The apparent reason for Durham's new choice of the applicable law was a decision by the federal district court for the Western District of Virginia, Lindner Fund v. Durham Hosiery Mills, Civ. Action No. 81-004(C) (W.D. Va. Jan. 27, 1981) (Michael, J.). In the course of dismissing a minority stockholder's suit for injunction against the Durham merger, that court stated that North Carolina law, specifically the North Carolina statutory provisions on minority stockholder rights, applied to the Durham merger.

agreeing that North Carolina law governed, granted Durham's motion and ordered White's suit dismissed for lack of subject matter jurisdiction.

White next commenced this action in federal district court in North Carolina.

To succeed in an action under Rule 10b-5,[8] a plaintiff must prove

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[8] Rule 10b-5 provides: It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. 17 C.F.R. §240.10b-5 (1983).

(1) that defendants made a misrepresentation or omission of a material fact, (2) that they did so with scienter, (3) that their action induced reliance on the part of the plaintiff, and (4) that the misrepresentation or omission caused plaintiff's loss. L.Loss, Fundamentals of Securities Regulation 1125-26 (1983). Proof of common law fraud under the law of North Carolina requires that plaintiff show (1) that defendants made a false representation or concealment of a material fact, (2) that they did so with knowledge of falsity or in culpable ignorance of its truth, (3) that they intended plaintiff to act on it, (4) that plaintiff reasonably relief and acted on it, and (5) that injury to the plaintiff resulted.

Johnson v. Phoenix Mutual Life Insurance Co., 300 N.C. 247, 266 S.E.2d 610, 615 (1980).

At the conclusion of all the evidence the trial court correctly instructed the jury concerning the application of Rule 10b-5 and the law of common law fraud to the facts of this case. The jury was asked by specific interrogatory:

> Did the Defendants knowingly or with reckless disregard, make representations of material fact in the proxy materials with regard to the applicable dissenters' rights statute in that the Defendants represented to the Plaintiff that in order to pursue his dissenters' rights with regard to the corporate merger, he had to comply with Virginia law and pursue his rights pursuant to the Virginia statutes, upon which the Plaintiff relied, in violation of Rule 10b -5?

> Did the Defendants knowingly or with reckless disregard employ any device, scheme or artifice to defraud the Plaintiff of his dissenters' rights, upon which the Plaintiff relied, in violation of Rule 10b-5?
>
> Did the Defendants commit common law fraud in that they knowingly or with reckless disregard made representations of material fact in the proxy materials with regard to the applicable dissenters' rights statute by representing to the plaintiff that in order to pursue his dissenters' right with regard to the corporate merger he had to comply with Virginia law and pursue his rights pursuant to the Virginia statute, and upon which misrepresentations the Plaintiff relied?

The jury responded affirmatively to each question.

Appellants contend that there was insufficient evidence of reliance, causation, and scienter to submit the issues to the jury. We do not agree. It is true that there was conflicting evidence as to the presence of the

three challenged elements, but the evidence presented by each side was substantial enough to support a jury decision in its favor. The standard for reviewing a directed verdict is the same as that for reviewing a judgment notwithstanding the verdict: a party must demonstrate that the evidence does not permit a reasonable juror to decide the issues in favor of his adversary. 9 Wright & Miller, Federal Practice and Procedure §2524 (1971); Scavens v. Macks Stores, Inc., 577 F.2d 870, 872-73 (4th Cir. 1978); Nationwide Mutual Insurance Co. v. McLaughlin, 429 F.2d 1317, 1317 (4th Cir. 1970). The appellants simply do not meet that burden under this test. Here the appellants' burden was to show that, when the evidence was con-

sidered in the light most favorable to White, there was no substantial evidence to support a verdict in his favor; that is, that the jury's inferences and conclusions from the evidence would be so tenuous as to rest "merely upon speculation and conjecture." Business Development Corp. v. United States, 428 F.2d 451, 453 (4th Cir.), cert. denied, 400 U.S. 957 (1970).

Likewise, we find unavailing appellants' contention that White's expert did not have sufficient information on which to base his valuation or that he based it upon an erroneous formula. He had conducted over one hundred business appraisals, had a demonstrated knowledge of appraisal techniques, and employed a widely-

accepted method of calculation. His qualifications were properly established prior to his substantive testimony, he was subjected to vigorous cross-examination, and the jury was properly instructed as to evaluating scientific knowledge.

Similarly without merit is appellants' contention that documentary evidence, including Durham's annual reports from fiscal years 1980 and 1981, was inadmissible because it contained information on the corporation's financial condition after the appropriate statutory date for valuation of White's stock. Cralle testified concerning Durham's financial condition in 1972 and stated that he did not know of a year in which it had been similarly successful. On

cross-examination he was questioned concerning 1981 and 1982, which in fact were similarly successful, and, at best, equivocated concerning the financial results of those years. In response to that, the trial court admitted White's evidence concerning Durham's financial condition in 1981 and 1982. The admission of evidence for the purpose of impeachment is in the trial court's discretion, Fed. R. Evid. 403; United States v. Vivero, 413 F.2d 971, 972 (2d Cir. 1969), cert. denied, 396 U.S. 1017 (1970); 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 607[05], at 607-63, -64 (1981 & Supp. 1984), and it is manifest that the trial court did not abuse its discretion in this instance.

Finally, the appellants urge that

the district court erred in denying their Rule 60(b) motion. After the district court trial, the parties discovered that the Danville Circuit Court had failed to enter a final order dismissing White's action in that court, apparently due to counsel's oversight. The Danville court concluded in 1981 that it lacked subject matter jurisdiction and orally ordered the case dismissed, but a dismissal order was never presented by counsel.

We agreed with White that the Virginia action appears to have effectively terminated in every sense short of formal final order, but that in any event the verdict of the federal district court jury was not grounded on the outcome of the Virginia case. The

basis of the federal jury verdict was appellants' conduct in misleading White concerning his right to pursue his appraisal action. This misrepresentation, without regard to the actual termination of the Virginia action, supplied a sufficient basis for compensatory and punitive damages under Rule 10b-5 and common law fraud.

The judgment of the district court is

AFFIRMED.

Filed January 7, 1985

EXHIBIT B

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF DANVILLE

DURHAM HOSIERY MILLS, INC.,	)	
	)	
Complainant,	)	No. 81-49
	)	
v.	)	ORDER
	)	
ROBERT C. WHITE,	)	
	)	
Defendant.	)	

This appraisal remedy proceeding came on for hearing on August 9, 1984 and the Court, having heard arguments of counsel for each of the parties, makes the following findings of fact and conclusions of law:

1. A proposed order duly endorsed by counsel substituting Messrs. Roddy and Webb as Robert C. White's counsel in place of Mr. Vaughan was tendered for entry and entered at this hearing. Messrs. Roddy and Webb then

participated in the hearing as counsel for Robert C. White and Mr. Vaughan was allowed to explain his earlier activities as counsel in this proceeding.

2. The 1981 draft of an order dismissing this proceeding was neither entered by this Court nor tendered for entry by this Court. The failure so to tender such draft order was intended to serve the best interests of Robert C. White and was not attributable to mistake or inadvertance. Having received no contrary instructions from Mr. White, Mr. White's counsel intentionally withheld such draft order for the definite purpose of keeping this proceeding alive.

3. Notices to the parties on February 16, 1984 that this proceeding

was among pending cases subject to being discontinued for inactivity under the provisions of Va. Code Ann. §8.01-335 (1978) were sent with the approval of this Court and not through mistake or inadvertance. This proceeding subsequently was removed from the list of threatened discontinuances for inactivity.

4. No dismissal or discontinuance has been entered herein and this proceeding has been pending continuously since its commencement. Under the circumstances, the Court cannot grant and therefore denies (1) the demurrer asserting earlier dismissal of this proceeding filed on behalf of the dissenting stockholders other than Mr. White as well as (ii) the request made by Mr. White's counsel for a

statement why the proceeding earlier was dismissed.

5. No further order having the effect of dismissing or discontinuing this proceeding retroactively will be entered herein. Should any dismissal, discontinuance or any other appealable decree herein be ordered in the future, any party aggrieved hereby will be accorded the time periods prescribed in the Rules of the Virginia Supreme Court then in effect to petition for rehearing, appeal and the like.

The Clerk is directed to send certified copies of this Order to all counsel of record.

It is so ORDERED and ADJUDGED.

B-5

ENTERED

/s/ James F. Ingram
Date: 10/1/84

/s/ Frederick L Russell

/s/ S. H. Kingoff

See and object to:

/s/ Kevin P. Roddy
Attorney for Robert C. White

In testimony that the foregoing is a true copy, take from the records of said court, I, Gerald A. Gibson, Clerk thereof, hereto set my hand and affix the seal of said court. This 1st day of October, 1984.

/s/ Gerald A. Gibson, Clerk
Circuit Court of Danville, Va.

By: B. TERRY
Deputy Clerk

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 83-2023

Robert C. White,

Appellee,

versus

Durham Hosiery Mills, Inc.; George A. Cralle, Individually; John P. Barnett, Individually; H. E. Schoenhut, Jr.; W. K. Bigelow; H. E. Rodenhizer and W. C. Spann,

Appellants.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, District Judge.

Upon consideration of the appellants' petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Sprouse for a panel consisting of Judge Murnaghan, Judge Sprouse and Judge Michael (U.S.D.J.)

For the Court,
JOHN M. GREACEN
Clerk
Filed February 1, 1985

EXHIBIT D

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

28 U.S.C. 17 C.F.R. 240.10b-5 (1976).

EXHIBIT E

(b) Any shareholder designated nated in G.S. 55-101(b) as having rights under this section in connection with amendment of the charter or designated in G.S. 55-119(b) as having rights under this section in connection with dissolution and liquidation of assets in kind, or any shareholder of a corporation effecting a merger, consolidation or sale of assets for shares may give to the corporation, prior to or at the meeting of the shareholders to which the proposal of amendment, dissolution, merger, consolidation or sale of assets for shares is submitted to a vote, written notice that he objects to such proposal. Within 20 days after the date on which the vote was taken, such shareholder may, unless he voted in person or by proxy in favor of the proposal, make written demand on the corporation for payment of the fair value of his shares. Such demand shall state the number and class of shares owned by him. In addition to any other right he may have in law or equity, a shareholder giving such notice shall be entitled, if and when the amendment, dissolution, merger, consolidation or sale of assets for shares is effected,

to be paid by the corporation the fair value of his shares, as of the day prior to the date on which the vote was taken, subject only to the surrender by him of the certificate representing his shares.

N.C. GEN. STAT.§55-113(b) (1925).

EXHIBIT F

§13.1-75. Rights of dissenting stockholders in mergers, consolidations or exchanges.

(c)(i) In order to exercise his rights under this section, a stockholder: (A) Must notify the corporation in writing of the number of shares as to which he wishes to exercise his rights under this section, by mailing or delivering a notice in writing, stating the number of shares as to which he wishes to exercise such rights, to the corporation at the address specified in the notice of the meeting, provided that such notice shall be effective only if it is received by the corporation prior to the voting by stockholders on the merger, consolidation or exchange, or is mailed by the stockholder not less than five days prior to the date on which the stockholders vote on such transaction; and (B) If the shares as to which he wishes to exercise rights under this section are entitled to vote on the transaction, shall not vote such shares in favor of the transaction, but a stockholder may exercise his rights under this section with respect to less than all shares held by him.

(ii) Within ten days after the issuance of the appropriate certificate under §13.1-75 the surviving, new or acquiring corportion shall send written notice to each stockholder who has complied with part (i) of this subsection (c) stating that he is entitled to receive payment of the fair value of his shares under this section and that he should submit his share certificates for notation. Within fifteen days after the mailing of the notice hereunder each stockholder to whom such notice is sent shall submit certificates representing the shares as to which he wishes to exercise his rights under this section to the surviving, new or acquiring corporation and such corporation shall make notation thereon that demand has been made and return such certificates to the shareholder.

(ii) If shares represented by a certificate on which notation has been so made shall be transferred, each new certificate issued therefor shall bear similar notation, together with the name of the original dissenting holder of such shares, and a transferee of such shares shall acquire by such transfer no rights in such

corporation other than those which the original dissenting stockholder had after making demand for payment of the fair value thereof. If a stockholder to whom notice has been sent shall not submit the certificates as herein required, hims rights under this section shall terminate, and he shall be bound by the terms of the merger, consolidation or exchange.

VA. CODE §13.1-75 (1978).